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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 DOCMAGIC, INC., a California corporation,
15 Plaintiff,
16 v.
17 ELLIE MAE, Inc., a Delaware corporation,
18 Defendant.

Case No. 3:09-CV-4017-MHP

**DOCMAGIC'S NOTICE OF
MOTION AND MOTION TO
DISMISS ELLIE MAE'S FIRST,
SECOND, THIRD, FOURTH,
FIFTH, SEVENTH, EIGHTH, AND
NINTH COUNTERCLAIMS**

Date: July 26, 2010
Time: 2:00 pm
Ctrm: 15

Hon. Marilyn Hall Patel

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4. For the breach of the Electronic Bridge Agreement claim (fourth counterclaim), whether Ellie Mae has failed to state a claim because it has not pled facts sufficient to support a claim that DocMagic used proprietary information that it obtained in connection with the agreement in order to retain access to Encompass users.

5. For the intentional interference with prospective economic advantage claim (eighth counterclaim), (a) whether Ellie Mae's failure to sufficiently identify the third parties whose contractual relationships were allegedly disrupted or impeded requires that the claim be dismissed, (b) whether Ellie Mae's failure to allege an independently wrongful act requires that the claim be dismissed, and (c) whether Ellie Mae has failed to state a claim because it has not pled facts that support a probability of future economic benefit to Ellie Mae.

6. For the inducement of breach of contract and intentional interference with contractual relationship claims (fifth and seventh counterclaims), (a) whether Ellie Mae's failure to sufficiently identify a party whose contractual relationship was allegedly disrupted or impeded requires that the claim be dismissed, and (b) whether Ellie Mae's failure to establish that any specific relationship was disrupted or impeded requires that the claim be dismissed.

7. For the California unfair competition claim (ninth counterclaim), (a) whether the claim fails for indefiniteness, (b) whether the claim fails because Ellie Mae did not allege conduct threatening an incipient violation of the antitrust laws, and (c) whether Ellie Mae lacks standing to make the claim because Ellie Mae fails to allege that it lost money or property as a result of the alleged unfair competition.

INTRODUCTION

Ellie Mae’s First Amended Counterclaim (“Counterclaim”) is largely supported by conclusory allegations and recitations of claim elements—precisely the type of allegations that the Supreme Court has held are insufficient to state a claim. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Ellie Mae attempts to allege a wide variety of claims, including copyright infringement, computer crimes, breach of contract, common law torts, and unfair competition. But once the conclusory, nonfactual allegations are

1 stripped away, all but one of Ellie Mae’s claims—a breach of contract claim—necessarily fails as
2 a matter of law.

3 Ellie Mae’s copyright infringement counterclaim, for example, alleges that DocMagic
4 contributorily infringed Ellie Mae’s copyright without including allegations that a third party
5 infringed as well. If there was no direct infringement by a third party, DocMagic cannot be liable
6 for contributory infringement.

7 Similarly, Ellie Mae has failed to plead facts sufficient to establish the type of economic
8 harm that is a prerequisite for a private cause of action under the federal computer statute.
9 Without that harm, Ellie Mae has no standing to bring the claim.

10 As for the common law torts, which all revolve around the concept of interfering with
11 contractual relationships with third parties, Ellie Mae has not adequately alleged that a contractual
12 relationship with Ellie Mae was disrupted or impeded.

13 Finally, Ellie Mae’s Section 17200 counterclaim fails for several reasons. It is too
14 indefinite under the applicable pleading standard, because it constitutes nothing more than a short
15 recitation of the claim elements. Ellie Mae also fails to plead the requisite “unfair” acts of
16 DocMagic and fails to plead that Ellie Mae lost money or property—both prerequisites to stating
17 a claim under Section 17200.

18 As set forth herein, the first, second, third, fourth, fifth, seventh, eighth, and ninth
19 counterclaims should be dismissed.

20 **FACTUAL BACKGROUND**

21 As alleged in the Counterclaim, DocMagic is a Carson, California-based company that
22 provides mortgage closing document preparation software. (Counterclaim ¶¶ 2, 28.) Ellie Mae
23 provides loan origination software, known as “Encompass,” for use by mortgage professionals.
24 (*Id.* ¶ 6.) The Encompass software includes a software development kit (“SDK”) used to allow
25 third-party applications to interface with Encompass. (*Id.* ¶ 7.) Ellie Mae’s licensees are
26 provided with unique license keys to use and access the Encompass software and the SDK. (*Id.*)
27 Ellie Mae also provides an online transaction platform known as “the ePASS Network” that
28 unites Encompass licensees with lender and settlement service providers. (*Id.* ¶ 8.)

1 From 2003 to 2009, through an agreement entitled “Electronic Bridge Agreement
2 Between Ellie Mae and Participator,” DocMagic participated as a provider of services through the
3 ePASS Network. (*Id.* ¶ 11.) In 2004, Ellie Mae entered into a reseller relationship with
4 DocMagic through which Ellie Mae acted as a non-exclusive reseller of certain DocMagic closing
5 document products. (*Id.* ¶¶ 28-29.) In connection with this reseller relationship, Ellie Mae and
6 DocMagic executed a “Strategic Partnership Agreement” in 2004, replaced by a “Reseller
7 Agreement” in 2006. (*Id.*) In 2009, Ellie Mae sent DocMagic notices of nonrenewal of both the
8 Electronic Bridge Agreement and the Reseller Agreement. (*Id.* ¶¶ 18, 37.)

9 Ellie Mae alleges that after the Electronic Bridge Agreement was terminated, DocMagic
10 accessed the Encompass servers and exported Ellie Mae and consumer information. (*Id.*
11 ¶¶ 19-20.) Ellie Mae alleges that this access was carried out in many cases by the use of Ellie
12 Mae licensees’ license keys and customer log-in credentials. (*Id.*) Ellie Mae alleges that
13 DocMagic has never been provided a license key for the Encompass SDK and that DocMagic
14 reverse-engineered, duplicated, modified, or otherwise used the SDK to create software.
15 (*Id.* ¶¶ 14, 21.) Ellie Mae alleges further that the software created in this manner by DocMagic
16 has been provided to DocMagic’s customers, and is used to bypass Ellie Mae’s ePASS Network
17 and gain direct connection to Ellie Mae’s Encompass software. (*Id.* ¶¶ 21-22.) Ellie Mae alleges
18 that DocMagic instructed Encompass licensees to use this software to connect to DocMagic
19 directly, in violation of the SDK License Agreements between Ellie Mae and Encompass
20 licensees. (*Id.* ¶¶ 25, 76.)

21 LEGAL STANDARD

22 A motion to dismiss should be granted where a party fails to state a claim upon which
23 relief can be granted. Fed. R. Civ. P. 12(b)(6). Dismissal is appropriate if a complaint lacks a
24 cognizable legal theory or lacks sufficient facts to support a cognizable legal theory.
25 *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). Although a court
26 is obliged to take all factual allegations in the complaint as true, allegations that are no more than
27 conclusions “are not entitled to the assumption of truth.” *Iqbal*, 129 S. Ct. at 1950. “[A]
28 plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels

1 and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
2 *Twombly*, 550 U.S. at 555 (internal quotations omitted); *see also Iqbal*, 129 S. Ct. at 1953
3 (clarifying that *Twombly* applies to “all civil actions”).

4 In *Iqbal*, the Supreme Court held that Rule 8 of the Federal Rules of Civil Procedure
5 “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation” and “does
6 not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”
7 *Iqbal*, 129 S. Ct. at 1949-50. This requirement applies to every element of each claim. For
8 example, the Respondent in *Iqbal* pled the elements of knowledge and a policy of discrimination
9 in a conclusory manner that amounted to “nothing more than a ‘formulaic recitation of the
10 elements’ of a constitutional discrimination claim.” *Id.* at 1951, quoting *Twombly*, 550 U.S. at
11 555. The Supreme Court held that these elements were “disentitle[d] . . . to the presumption of
12 truth” and the pleadings “[did] not meet the standard necessary to comply with Rule 8.” *Id.* at
13 1951-52; *see also Twombly*, 550 U.S. at 553-54, 57 (conclusory allegation of “agreement”
14 element insufficient to state claim for Sherman Act Section 1 claim).

15 ARGUMENT

16 I. ELLIE MAE FAILS TO STATE A CLAIM FOR COPYRIGHT 17 INFRINGEMENT (*COUNTERCLAIM 1*)

18 Ellie Mae’s copyright infringement counterclaim is fundamentally flawed because it is not
19 specific enough to satisfy the pleading requirements set out in *Twombly* and *Iqbal*. *Iqbal*, 129 S.
20 Ct. at 1949-50; *Twombly*, 550 U.S. at 555. The Counterclaim is so vague that DocMagic has not
21 been put on notice as to which act by DocMagic is alleged to have infringed which Ellie Mae
22 copyright. For example, the Counterclaim as drafted includes a laundry list of potentially
23 infringing acts allegedly done by DocMagic, all connected by a series of “and/or” modifiers.
24 Sprinkled among them are acts that do not even constitute copyright infringement, such as
25 reverse-engineering and unlicensed use of a software program. The Counterclaim also appears to
26 allege that DocMagic contributed to a third party’s infringement of Ellie Mae’s copyright
27 “and/or” induced a third party to infringe it, but there are no factual allegations supporting a claim
28 of contributory infringement or inducement. Finally, the allegations are so conclusory that it

1 appears that Ellie Mae may even be claiming that DocMagic has infringed materials in which
2 Ellie Mae does not claim to own the copyright.

3 The copyright infringement counterclaim should be dismissed under Rule 12(b)(6) for
4 failure to state a claim and, if it is permitted to amend a second time, Ellie Mae should be required
5 to provide specific factual allegations for each element to support a copyright infringement claim.

6 **A. The Allegations of Direct Infringement Are Inadequate**

7 The Ninth Circuit has defined the elements required to prove copyright infringement as
8 proving both that the plaintiff owns the original material at issue and that the defendant violated
9 one of the six rights that are exclusive to the copyright owner, namely (i) the right to reproduce
10 the work, (ii) the right to prepare derivative works, (iii) the right to distribute copies of the work,
11 (iv) the right to perform the work publicly, (v) the right to display the work, and (vi) the right to
12 perform the work publicly by digital audio transmission. 17 U.S.C. § 106; *see also Kelly v.*
13 *Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003) (owner of copyright has exclusive right to
14 reproduce, distribute, and publicly display copies of work); *Entm't Research Group v. Genesis*
15 *Creative Group*, 122 F.3d 1211, 1217 (9th Cir. 1997) (to establish copyright infringement,
16 copyright holder must prove both valid ownership of copyright and infringement of that
17 copyright). If a copyright infringement claim fails to allege either or both of these elements, it is
18 deficient and must be dismissed for failure to state a claim.

19 Ellie Mae's Counterclaim is so vague, in part due to overuse of the "and/or" modifier, that
20 it is impossible to discern what DocMagic is alleged to have done. Although not certain,
21 DocMagic believes that Ellie Mae may be basing its copyright infringement claim upon the
22 following allegations:

23 DocMagic has illegally obtained unauthorized access to, and used,
24 the Encompass software, including the SDK. (Counterclaim ¶ 19.)

25 ...

26 Doc Magic has reverse engineered, duplicated, modified, and/or
27 otherwise used the SDK and other Ellie Mae Proprietary
28 Information, without Ellie Mae's authorization, to create software.
(*Id.* ¶ 21.)

...

1 DocMagic XL Technology uses, duplicates, incorporates, and/or
2 invokes Ellie Mae's Encompass SDK. (*Id.*, ¶ 22.)

3 ...

4 DocMagic has attempted and/or continues to attempt to reverse
5 engineer Ellie Mae's proprietary and confidential Encompass and
6 SDK software. (*Id.* ¶ 27.)

7 ...

8 By causing, accomplishing, engaging in, and/or enabling the
9 unauthorized copying, distribution, and/or use of the Encompass
10 software and SDK, DocMagic has directly infringed, and is
11 continuing to directly infringe, Ellie Mae's copyrights. (*Id.* ¶ 47.)

12 These vague and confusing references to alternative acts, which may or may not have
13 happened, do not provide enough notice for DocMagic to meaningfully respond and defend itself,
14 and thus fail to state a claim. *See Williams v. Foote*, No. CV 08-2838-CJC (JTL), 2009 U.S. Dist.
15 LEXIS 81958, at *48-49 & n.8 (C.D. Cal. Apr. 30, 2009) (directing plaintiff to file amended
16 complaint with specificity sufficient to enable defendants to frame defense). At most, these
17 references "create a suspicion" of a copyright claim, and the Supreme Court has made it clear that
18 this is not sufficient to withstand a Rule 12(b)(6) motion. *See Twombly*, 550 U.S. at 555 ("The
19 pleading must contain something more . . . than . . . a statement of facts that merely creates a
20 suspicion of a legally cognizable right of action.") (internal quotation omitted).

21 Moreover, several of the acts listed above do not even constitute copyright infringement
22 and cannot serve as a basis for a copyright claim: reverse-engineering, "unauthorized access,"
23 and "use" of a software program, whether authorized or not. *See* 17 U.S.C. § 106; *Altera Corp. v.*
24 *Clear Logic, Inc.*, 424 F.3d 1079, 1089-90 (9th Cir. 2005) (holding that claim concerning
25 unauthorized use of software program is "not within the rights protected by the federal Copyright
26 Act"); *Meridian Project Sys. v. Hardin Constr. Co., LLC*, 426 F. Supp. 2d 1101, 1109 (E.D. Cal.
27 2006) ("Reverse engineering is not within the scope of the exclusive rights of copyright."); *EBay,*
28 *Inc. v. Bidder's Edge*, 100 F. Supp. 2d 1058, 1072 (N.D. Cal. 2000) (right to exclude others from
use of computer systems without authorization is "qualitatively different from copyright
infringement claim") (internal quotation omitted). Allegations of acts that are not violations of

1 the Copyright Act are insufficient to state a claim for copyright infringement and cannot survive a
2 motion to dismiss. *See Ent'mt Research Group*, 122 F.3d at 1217.

3 Finally, to the extent that Ellie Mae may rely on its allegation that “DocMagic has copied
4 and exported, and/or has induced the illegal copying and exporting of, confidential materials to be
5 used with its own software” (Counterclaim ¶ 20) to support its copyright claim, this allegation is
6 insufficient for two reasons. First, the allegation does not identify the “confidential materials”
7 with sufficient detail for DocMagic to know what it is alleged to have copied and exported, and
8 second, the allegation does not even allege that Ellie Mae owns the copyright in the “confidential
9 materials”—a crucial element in a copyright infringement claim. If it does not own the copyright
10 in the allegedly copied and exported “confidential materials,” Ellie Mae cannot assert copyright
11 infringement. *Ent'mt Research Group*, 122 F.3d at 1217.

12 In sum, Ellie Mae’s claim of direct copyright infringement is not sufficiently definite to
13 withstand a motion to dismiss. If Ellie Mae is permitted to amend its Counterclaim, it should be
14 required to identify the allegedly infringed materials and the allegedly infringing acts with
15 sufficient specificity to put DocMagic on notice so that DocMagic can formulate defenses to
16 these allegations.

17 **B. The Allegations of Contributory Infringement/Inducement Are**
18 **Inadequate**

19 The Ninth Circuit has held that a claim for indirect copyright infringement may be stated
20 by alleging either contributory or vicarious infringement. *Perfect 10, Inc. v. Amazon.com, Inc.*,
21 508 F.3d 1146, 1169 (9th Cir. 2007) (defining secondary liability doctrines of contributory and
22 vicarious infringement: “one infringes contributorily by intentionally inducing or encouraging
23 direct infringement, and infringes vicariously by profiting from direct infringement while
24 declining to exercise a right to stop it”) (quoting *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S.
25 913, 930 (2005)). Under either theory, the plaintiff must first show direct infringement by a third
26 party. *Id.* Thus, indirect copyright infringement “does not exist in the absence of direct
27 infringement by a third party.” *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir.
28 2001).

1 With respect to contributory infringement and inducement, Ellie Mae alleges the
2 following: DocMagic provided its customers, including Encompass licensees, with “the
3 DocMagic XL Technology”; the DocMagic XL Technology was provided to Encompass
4 licensees who have never been licensed to use the Encompass SDK or who “lacked a license key
5 for the SDK”; DocMagic “instructed” the licensees to use the technology in connection with Ellie
6 Mae’s Encompass program and the SDK “without Ellie Mae’s consent or authorization and in
7 direct violation of the SDK license terms”; and DocMagic never informed any Encompass
8 licensee that use of DocMagic XL Technology would violate Ellie Mae’s rights. (Counterclaim
9 ¶¶ 23-26.) Based upon these sparse allegations, Ellie Mae alleges that “DocMagic has also
10 *contributorily infringed* Ellie Mae’s copyrights because it has knowingly *induced, caused, and/or*
11 *materially contributed* to the unauthorized copying, distribution,¹ and/or use of the Encompass
12 software and SDK by DocMagic XL Technology users.” (*Id.* ¶ 48 (emphasis added).)

13 At their essence, Ellie Mae’s allegations are merely that its licensees may have been
14 induced to use DocMagic XL Technology in conjunction with Encompass and the SDK, in
15 violation of the Encompass license agreement. These allegations, however, are not sufficient to
16 support a claim for contributory copyright infringement or inducement because the act that
17 DocMagic is alleged to have induced is not copyright infringement. As explained above,
18 *unauthorized use* of a software program does not constitute copyright infringement. *See Altera*
19 *Corp.*, 424 F.3d at 1089-90 (unauthorized use of software program is “not within the rights
20 protected by the federal Copyright Act”); *EBay, Inc.*, 100 F. Supp. 2d at 1072 (right to exclude
21 others from use of computer systems without authorization is “qualitatively different from
22 copyright infringement claim”) (internal quotation omitted).

23
24
25 ¹ Although the Counterclaim itself alleges “copying” and “distribution” (Counterclaim
26 ¶ 48), the relevant factual allegations do not mention either copying or distribution by Ellie Mae’s
27 licensees; they refer only to DocMagic’s alleged instructions to “use” DocMagic XL Technology
28 with Encompass of the SDK. (*See id.* ¶ 25.) Thus, there is no factual support for Ellie Mae’s
allegation that DocMagic contributed to the copying or distribution of Ellie Mae’s copyrighted
materials and this portion of the Counterclaim is not sufficient under *Iqbal* and *Twombly*.

Moreover, even if unauthorized use of software could constitute copyright infringement, Ellie Mae does not allege actual use of the software; instead, it merely alleges that DocMagic *instructed* licensees to use the software. (Counterclaim ¶ 25.) Instructions alone, however, are not sufficient for a contributory copyright infringement or inducement claim because such claims require an infringing *act* by a third party. *A&M Records*, 239 F.3d at 1013 n.2 (indirect copyright infringement “does not exist in the absence of direct infringement by a third party”). Without a claim for copyright infringement by Encompass licensees, Ellie Mae cannot state a claim for contributory copyright infringement or inducement against DocMagic and Ellie Mae’s claims must be dismissed under Rule 12(b)(6).²

II. ELLIE MAE FAILS TO STATE A CLAIM UNDER THE COMPUTER FRAUD AND ABUSE ACT (*COUNTERCLAIM 2*)

Ellie Mae also fails to state a claim under the Computer Fraud and Abuse Act (the “CFAA”) because it does not plead facts sufficient to support several required elements for such a claim. The CFAA is a criminal statute intended to prevent significant damage to computer records and persons by computer hackers or other such unauthorized users. *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1130-31 (9th Cir. 2009); *see also In re Doubleclick Privacy Litig.*, 154 F. Supp. 2d 497, 526 (S.D.N.Y. 2001) (“the histories of these statutes reveal specific Congressional goals—punishing destructive hacking, preventing wiretapping for criminal or tortious purposes, securing the operations of electronic communication service providers—that are carefully embodied in these criminal statutes and their corresponding civil rights of action”).

Ellie Mae has attempted to allege two types of CFAA actions: unauthorized access to obtain information from a computer, and unauthorized access of a computer to conduct a fraud

² The remaining elements of contributory copyright infringement all make reference to the direct infringement by a third party and are nonsensical when applied to a case where no direct infringement by a third party has been alleged. *See Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 795, 802 (9th Cir. 2007), *cert denied*, 230 S. Ct. 2871 (2008) (elements of contributory copyright infringement are knowledge of direct infringement and material contribution to or inducement of infringing activity). Having failed to plead such directly infringing activity, Ellie Mae *a fortiori* has not pled factual allegations supporting these elements.

1 and to obtain something of value. (Counterclaim ¶¶ 56-57 (citing 18 U.S.C. § 1030(a)(2)(C),
2 (a)(4)).) The CFAA provides civil penalties under certain circumstances. 18 U.S.C. § 1030(g).

3 Ellie Mae's allegations are deficient for several reasons. Most significantly, a private
4 right of action under the CFAA is only available to address certain specified types of conduct
5 (*Id.*), and Ellie Mae has not pled sufficient facts to establish that it has a private right of action.

6 Also, one of the claims that Ellie Mae is asserting requires a finding that DocMagic
7 "intentionally access[ed] a computer without authorization or exceed[ed] authorized access, and
8 thereby obtain[ed] . . . information from any protected computer." 18 U.S.C. § 1030(a)(2)(C).
9 However, Ellie Mae has not pled sufficient facts to support an allegation that DocMagic
10 intentionally accessed a computer without authorization.

11 The other claim that Ellie Mae is asserting requires a finding that DocMagic "knowingly
12 and with intent to defraud, access[ed] a protected computer without authorization, or exceed[ed]
13 authorized access, and by means of such conduct further[ed] the intended fraud and obtain[ed]
14 anything of value, unless the object of the fraud and the thing obtained consists only of the use of
15 the computer and the value of such use is not more than \$5,000 in any 1-year period." 18 U.S.C.
16 § 1030(a)(4). Ellie Mae also has not pled facts to support an allegation that DocMagic knowingly
17 accessed a computer without authorization and with the intent to commit fraud, or that DocMagic
18 took something that was valued at more than \$5,000.

19 Ellie Mae's allegations of a CFAA violation are simply not sufficient under the *Iqbal* and
20 *Twombly* standard, and this cause of action should be dismissed.

21 **A. Ellie Mae Does Not Allege Facts to State a Private Cause of Action**
22 **Under the CFAA**

23 Ellie Mae has failed to allege facts that would support the only basis under which it can
24 bring a private cause of action under the CFAA: economic harm.³ Because it has not properly

25 ³ The remaining circumstances where a private cause of action exists are impairment of
26 medical examination, diagnosis, or treatment, physical injury, threat to public health or safety,
27 and damage affecting a government computer. 18 U.S.C. § 1030(c)(4)(A)(i)(II)-(V), (g). None
28 has been alleged in this case and none applies.

1 alleged economic harm, Ellie Mae does not have standing to bring a private cause of action (*see*
2 18 U.S.C. § 1030(g)), and the claim should be dismissed in its entirety under Rule 12(b)(6).

3 General allegations of harm are not sufficient. The CFAA itself specifies that the alleged
4 economic harm must be at least \$5,000 in value. 18 U.S.C. § 1030(c)(4)(A)(i)(I), (g). In
5 interpreting that requirement, courts have held that only specific financial losses are recoverable.
6 Generalized statements of loss or non-financial damages are not sufficient to withstand a motion
7 to dismiss. *See Doubleclick*, 154 F. Supp. 2d at 524 n. 33 (allegations claiming invasion of
8 privacy, trespass to personal property, and misappropriation of confidential data not actionable
9 because “only economic losses are recoverable under § 1030(g)”). Moreover, the economic
10 damage must total at least \$5,000 from a *single act*; it cannot be aggregated across multiple
11 alleged acts of wrongful conduct. *Id.* at 523-24; *cf. Chance v. Ave. A, Inc.*, 165 F. Supp. 2d 1153,
12 1159-60 (W.D. Wash. 2001) (stating that Congressional intent was “to punish only the most
13 severe of computer fraud actions” and granting judgment as matter of law for failure to provide
14 evidence that each alleged act of defendant caused at least \$5,000 of damage or loss) (citing
15 *Doubleclick*, 154 F. Supp. 2d at 521-522).

16 Ellie Mae does not begin to plead such a claim. As with most of its other claims, Ellie
17 Mae offers only an insufficient formulaic recitation of the element: “Ellie Mae has suffered
18 damages and loss by reason of these violations, including, without limitation, harm to Ellie Mae’s
19 data and/or computer(s) and other losses and damages in an amount to be proved at trial, but in
20 any event, in an amount over \$5000 *aggregated over a one-year period*.” (Counterclaim ¶ 59
21 (emphasis added).) This formulaic recitation of elements alone is insufficient. *Twombly*,
22 550 U.S. at 555. It does not plead factual allegations supporting any financial loss, much less
23 facts to support a claim of over \$5,000 in losses from a *single act*. *See Doubleclick*, 154 F. Supp.
24 2d at 526 (holding that plaintiffs failed to allege facts to support damage threshold and granting
25 motion to dismiss with prejudice); *In re Intuit Privacy Litig.*, 138 F. Supp. 2d 1272, 1281 (C.D.
26 Cal. 2001) (granting motion to dismiss where complaint did not include sufficient facts
27 constituting allegation that plaintiffs suffered at least \$5,000 in economic damages).
28

1 Because Ellie Mae has not pled facts to establish that it has a private right of action, the
2 CFAA claim should be dismissed.

3 **B. Ellie Mae Has Not Pled Facts to Support Its Allegations That**
4 **DocMagic Had the Requisite Intent to Violate the CFAA**

5 As a matter of law, Ellie Mae can succeed on its specific CFAA claims only if it can prove
6 the requisite intent for each type of claim: that DocMagic intentionally accessed a computer
7 without authorization, or that DocMagic knowingly and with intent to defraud accessed a
8 computer without authorization. 18 U.S.C. § 1030(a)(2)(C), (a)(4). Although Ellie Mae’s second
9 counterclaim includes bare allegations that DocMagic’s alleged unauthorized computer access
10 was both “intentional” and “knowing” (Counterclaim ¶¶ 56-57), such allegations are not
11 sufficient to withstand a motion under Rule 12(b)(6) when, as here, there are no supporting
12 factual allegations.

13 Paragraphs 19-27 of the Counterclaim, which contain the factual allegations relevant to
14 the copyright and computer claims, do not contain a single allegation regarding DocMagic’s
15 mental state. (See Counterclaim ¶¶ 19-27.) Instead, these paragraphs focus solely on Ellie Mae’s
16 mental state—its belief that what DocMagic was doing was “unauthorized”—which is irrelevant
17 to the analysis. Because Ellie Mae has included no facts to support its allegations regarding
18 DocMagic’s mental state, and instead has merely recited the requisite mental state in the list of
19 elements for the claim, its CFAA claim cannot survive a motion to dismiss. *Iqbal*, 129 S. Ct. at
20 1949-50; *Twombly*, 550 U.S. at 555.

21 **C. Ellie Mae Has Not Pled Facts to Support Its Allegation That DocMagic**
22 **Accessed a Computer Without Authorization**

23 Although Ellie Mae has included a conclusory allegation that DocMagic was
24 “unauthorized” to access Ellie Mae’s computers, the underlying factual allegations contradict,
25 rather than support, this claim. Ellie Mae’s allegations reveal that DocMagic was acting *with the*
26 *authorization of Ellie Mae’s licensees and customers*. (Counterclaim ¶ 20.) For example, Ellie
27 Mae states that DocMagic accessed Encompass software and servers by using the license keys
28 and customer log-in credentials of Ellie Mae’s own licensees. (*Id.*) Although it characterizes the

1 use of the log-in credentials as “pre-textual,” Ellie Mae does not allege that these keys or log-in
2 credentials were fraudulent, stolen, or otherwise acquired without the licensees’ consent. (*Id.*)
3 Thus, the factual allegations in the Counterclaim do not support the legal conclusion that the
4 access was unauthorized. Where factual allegations contradict the conclusory legal allegations
5 pled by a party in its attempt to state a claim, the claim should be dismissed. *See Estate of Hirata*
6 *v. Ida*, No. 10-00084 LEK, 2010 U.S. Dist. LEXIS 53932, at *16-17 (D. Hawaii May 28, 2010)
7 (granting motion to dismiss because factual allegations contradicted conclusory legal allegation).
8 Accordingly, Ellie Mae has not stated a claim under the CFAA.

9 Moreover, this dismissal should be with prejudice, because using a licensee’s license keys
10 and customer log-in credentials to access a computer can never be a basis for a CFAA claim
11 where the access was with the licensees’ permission, as here. *See, e.g., AtPac, Inc. v. Aptitude*
12 *Solutions, Inc.*, No. CIV. C:10-291 WBS KJM, 2010 U.S. Dist. LEXIS 42109, at *19 (E.D. Cal.
13 Apr. 29, 2010) (granting motion to dismiss and holding that allegations of subterfuge would have
14 been necessary in order to “find a defendant not party to a license agreement civilly liable under
15 the CFAA where the licensee grants it authority to access information in violation of the license
16 agreement”); *SecureInfo Corp. v. Telos Corp.*, 387 F. Supp. 2d 593, 608-10 (E.D. Va. 2005)
17 (holding that defendant could not have intentionally acted without authorization where defendant
18 was acting under permission of plaintiff’s licensee).

19 Because Ellie Mae has failed to plead factual allegations supporting the required element
20 of “without authorization,” and has instead pled factual allegations contradicting this element,
21 Ellie Mae’s CFAA claim should be dismissed.

22 **D. Ellie Mae Has Not Pled Facts Showing an Intent to Defraud or**
23 **Furtherance of an “Intended Fraud”**

24 Ellie Mae’s claim that DocMagic committed a fraud in violation of the CFAA is deficient
25 because Ellie Mae fails to allege a single fact to support the fraud allegation. Indeed, it does not
26 even define what the allegedly “intended fraud” was. The Counterclaim does not disclose who
27 Ellie Mae believes has been defrauded, how the alleged fraud took place, how DocMagic
28 “furthered” that fraud, or what the nature of the fraud was. All that Ellie Mae has alleged is that

1 DocMagic “furthered” an “intended fraud.” (Counterclaim ¶ 57.) This bare-bones allegation
2 with no supporting facts is insufficient to support a cognizable fraud theory, puts DocMagic in the
3 untenable position of being unable to defend itself against the serious claim of fraud, and is
4 contrary to the Supreme Court’s holdings in *Iqbal* and *Twombly*. See *Iqbal*, 129 S. Ct. at 1949-
5 50; *Twombly*, 550 U.S. at 555. Accordingly, the fraud-based portion of Ellie Mae’s CFAA
6 counterclaim should be dismissed for failure to state a claim.⁴

7 **III. ELLIE MAE FAILS TO STATE A CLAIM UNDER THE**
8 **COMPREHENSIVE COMPUTER DATA ACCESS AND FRAUD ACT**
9 **(COUNTERCLAIM 3)**

10 Ellie Mae’s California Comprehensive Computer Data Access and Fraud Act
11 (“CCDAFA”) claim is deficient for similar reasons. First, as discussed above, Ellie Mae has pled
12 no factual allegations addressing DocMagic’s mental state. The CCDAFA prohibits nine types of
13 computer crimes, and the element of “knowingly” is common to all. Cal. Penal Code § 502(c)(1)-
14 (9). Ellie Mae’s failure to plead facts supporting the required element of knowledge renders the
15 CCDAFA counterclaim deficient and subject to dismissal per *Iqbal* and *Twombly*. *Iqbal*, 129 S.
16 Ct. at 1949-50; *Twombly*, 550 U.S. at 555.

17 Second, Ellie Mae makes factual allegations that contradict its claim that DocMagic’s
18 access of computers was without permission, an element that is common to all provisions of the
19 CCDAFA other than the provision addressing computer contaminants, which is not alleged or at
20 issue in this case. Cal. Pen. Code § 502(c)(1)-(9). When the alleged facts contradict the alleged
21 legal theory, a motion to dismiss is appropriate. See *Estate of Hirata*, 2010 U.S. Dist. LEXIS
22 53932, at *16-17. Thus, the CCDAFA counterclaim must be dismissed in its entirety.

23
24 ⁴ Although the Ninth Circuit has not addressed the issue of whether a heightened pleading
25 standard applies to Section 1030(a)(4)’s requirement that the defendant’s acts furthered an
26 intended fraud, the public policy reasons for the heightened Fed. R. Civ. P. 9(b) pleading standard
27 are just as compelling in this case and should lead to the conclusion that this standard applies.
28 See, e.g., *Motorola, Inc. v. Lemko Corp.*, 609 F. Supp. 2d 760, 765 (N.D. Ill. 2009) (“Rule 9(b)’s
requirement that ‘[i]n alleging fraud . . . , a party must state with particularity the circumstances
constituting fraud,’ . . . quite plainly applies to section 1030(a)(4)’s requirement that the
defendant’s acts further the intended fraud.”).

1 **IV. ELLIE MAE FAILS TO STATE A CLAIM FOR BREACH OF THE**
2 **ELECTRONIC BRIDGE AGREEMENT (*COUNTERCLAIM 4*)**

3 Ellie Mae fails to state a claim for breach of the Electronic Bridge Agreement, because
4 Ellie Mae does not plead factual allegations supporting its claim that DocMagic took actions
5 prohibited by the contract.

6 In deciding a motion to dismiss, a court may consider the entire contract if the claim
7 necessarily relies on the contract and the authenticity of the contract is not contested.
8 *Strawflower Elecs., Inc. v. Radioshack Corp.*, No. C-05-0747 MMC, 2005 U.S. Dist. LEXIS
9 45205, at *6, *9 n.1 (N.D. Cal. Sept. 20, 2005). If it is clear from the unambiguous terms of a
10 contract that the conduct alleged by the plaintiff does not constitute a breach, a court may grant a
11 motion to dismiss the breach of contract claim. *Joaquin v. GEICO Gen. Ins. Co.*, No. C 07-3259
12 JSW, 2008 U.S. Dist. LEXIS 2077, at *5-8 (N.D. Cal. Jan. 2, 2008) (dismissing breach of
13 contract claim where insurance policy did not prohibit alleged conduct of defendant); *see also*
14 *Tain v. Hennessey*, No. CIV S-08-3085-GEB-CMK-P, 2009 U.S. Dist. LEXIS 11654, at *20-21
15 (S.D. Cal. Dec. 1, 2009) (granting motion to dismiss where unambiguous terms of contract
16 demonstrated alleged conduct did not constitute breach).

17 Here, Ellie Mae alleges that DocMagic “illegally retained its access to Encompass users
18 through the unauthorized and illegal use of Ellie Mae Proprietary Information, including the
19 Encompass SDK.” (Counterclaim ¶ 68.) Ellie Mae alleges that this constitutes a material breach
20 of the Electronic Bridge Agreement and makes specific reference to Sections 1 and 10.4. (*Id.*
21 ¶ 69.)

22 Section 1 contains no language that appears relevant to the alleged breach.⁵ Ellie Mae is
23 apparently alleging a breach of Section 10.4 of the Electronic Bridge Agreement based on
24 DocMagic’s supposed “use” of Ellie Mae’s “proprietary information.” That claim, however, fails

25 ⁵ Ellie Mae intends to submit a copy of the Electronic Bridge Agreement under seal with
26 its motion to dismiss, which will be filed the same day as this motion. For the convenience of the
27 Court, DocMagic will not separately submit the same contract under seal. DocMagic therefore
28 refers the Court to Ellie Mae’s submission for review of the contract provisions cited herein.

1 as a matter of law based on the contract's unambiguous language. Section 10.4 prohibits
2 continued use of proprietary information that was "*obtained in connection with this Agreement.*"⁶
3 The Counterclaim, however, does not allege that DocMagic attempted to retain access to
4 Encompass users by using proprietary information that DocMagic "*obtained in connection with*
5 *the Agreement.*"

6 Instead, the Counterclaim expressly alleges that DocMagic retained access to Encompass
7 users by using the *licensees'* license keys and log-in credentials (Counterclaim ¶¶ 19-20), and the
8 Counterclaim makes clear that DocMagic itself never received a license key for the Encompass
9 SDK. (*Id.* ¶ 14.) Thus, Ellie Mae alleges no facts that would constitute a breach of Section 10.4
10 of the Electronic Bridge Agreement. Because Ellie Mae has included no facts to support its
11 allegations regarding breach of the Electronic Bridge Agreement, its counterclaim cannot survive
12 a motion to dismiss. *Iqbal*, 129 S. Ct. at 1949-50.

13 Accordingly, Ellie Mae has failed to state a claim for breach of contract and its fourth
14 counterclaim should be dismissed.

15 **V. ELLIE MAE FAILS TO STATE A CLAIM FOR INTENTIONAL**
16 **INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE**
(COUNTERCLAIM 8)

17 Ellie Mae fails to state a claim for intentional interference with prospective economic
18 advantage because (1) it does not sufficiently identify a third party whose relationship was
19 disrupted, (2) it does not plead factual allegations showing an actionable independently wrongful
20 act, and (3) it fails to plead any factual allegations showing a probability of future economic
21 benefit, each of which is a required element of the tort. *Korea Supply Co. v. Lockheed Martin*
22 *Corp.*, 29 Cal. 4th 1134, 1153 (2003); *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 42 Cal.
23 App. 4th 507, 521-22 (1996).

24
25
26
27 ⁶ Again, DocMagic refers the Court to the copy of the contract submitted under seal by
28 Ellie Mae.

1 **A. Ellie Mae Fails Adequately to Identify the Third Parties Whose**
2 **Relationships with Ellie Mae Were Disrupted**

3 The requirement that the third parties that are the subject of the interference be adequately
4 identified is an essential element of this claim. *Westside Ctr. Assocs.*, 42 Cal. App. 4th at 518,
5 527 (holding that plaintiff has to show “an existing relationship with an identifiable buyer,” not
6 merely class of unknown potential buyers, for interference with prospective economic benefit
7 claim); *Eldorado Stone, LLC v. Renaissance Stone, Inc.*, No. 04cv2562 JM(LSP), 2005 U.S. Dist.
8 LEXIS 45237, at *13 (S.D. Cal. Aug. 10, 2005) (dismissing claim where plaintiff alleged
9 interference with “unidentified potential customers”).

10 Here, Ellie Mae defines the term “Ellie Mae Clients” to include all Encompass users.
11 (Counterclaim ¶ 29.) Its interference with prospective economic advantage counterclaim refers
12 only to “valid and existing business relationships with the Ellie Mae Clients” (*id.* ¶ 96), and does
13 not specifically identify a single client who decided not to do business with Ellie Mae or provide
14 further information about the class of alleged potential clients. Ellie Mae’s vague “I-lost-
15 business-with-some-or-all-Encompass-users” is identical to the “interference with the market”
16 theory that has been roundly rejected by California courts. *See, e.g., Westside Ctr. Assocs.*,
17 42 Cal. App. 4th 507, 523 (rejecting “lost opportunity” approach because it would “allow[]
18 recovery no matter how speculative the plaintiff’s expectancy”).

19 Because it has not adequately identified the prospective relationships with which
20 DocMagic is alleged to have interfered, Ellie Mae fails to state a claim for interference with
21 prospective economic advantage, and that claim should be dismissed.

22 **B. Ellie Mae Does Not Allege Actionable Wrongful Conduct**

23 The California Supreme Court held in *Korea Supply* that “[t]o establish a claim for
24 interference with prospective economic advantage . . . a plaintiff must plead that the defendant
25 engaged in an independently wrongful act.” *Korea Supply*, 29 Cal. 4th at 1158. This “wrongful
26 act” cannot be the act of interference itself, as mere interference without additional wrongdoing is
27 not tortious. *Id.* at 1158-59; *Lackey v. CBS Radio, Inc.*, No. C 06-03987 MHP, 2008 U.S. Dist.
28

1 LEXIS 7638 (N.D. Cal. Feb. 1, 2008) (allegation of interference that could not be independently
2 wrongful other than fact of interference itself was insufficient to state claim).

3 Moreover, California courts have consistently held that a breach of contract cannot meet
4 the “wrongful act” requirement, as this would essentially allow plaintiffs to “transmute[]” a
5 contract claim “into tort liability by claiming that the breach interfered with the promisee’s
6 business.” *JRS Prods., Inc. v. Matsuhita Elec. Corp. of America*, 115 Cal. App. 4th 168, 181-83
7 (2004); *Khoury v. Maly’s of Cal., Inc.*, 14 Cal. App. 4th 612, 618 (1993) (affirming dismissal
8 without leave to amend and stating that if “plaintiff could plead in a conclusory way that the
9 defendant maliciously intended to drive the plaintiff out of business, the tort of interference with
10 prospective business advantage would be routinely pleaded in breach of contract cases”); *see also*
11 *PAI Corp. v. Integrated Sci. Solutions, Inc.*, No. C-06-05349 JCS, 2009 U.S. Dist. LEXIS 38833,
12 at *45 (N.D. Cal. Apr. 23, 2009) (alleged breach of contract “may not provide the basis for tort
13 liability on a claim for interference with prospective economic advantage”) (citing *JRS Prods.*,
14 115 Cal. App. 4th at 181-83).

15 Such transmutation is precisely what Ellie Mae is attempting to do with this counterclaim.
16 As in *JRS Products*, the conduct underlying Ellie Mae’s intentional interference with prospective
17 economic advantage claim sounds in contract, not in tort. *See JRS Prods.*, 115 Cal. App. 4th at
18 181 (“our job is to determine whether the essence of the claim is fundamentally based on conduct
19 that sounds in contract or in tort.”). Ellie Mae’s counterclaim for intentional interference with
20 prospective economic advantage is based solely on its allegation that DocMagic “induc[ed]
21 customers to acquire . . . services directly from DocMagic rather than using Ellie Mae’s
22 solutions.” (Counterclaim ¶ 98.) It argues that this solicitation was “in direct violation of the
23 Reseller Agreement.” (*Id.* ¶ 43.)

24 Thus, the only basis for Ellie Mae’s claim of interference with prospective economic
25 advantage is that DocMagic breached the Reseller Agreement. This is not sufficient. *See PAI*
26 *Corp.*, 2009 U.S. Dist. LEXIS 38833, at *45 (allegation of breach of contract is not sufficient to
27 alleged interference with prospective economic advantage). The eighth counterclaim should be
28 dismissed.

1 **C. Ellie Mae Has Not Pled Facts Showing a Probability of Future**
2 **Economic Benefit**

3 Ellie Mae is also required to plead facts supporting its claim that it would have received a
4 specific future economic benefit but for DocMagic's conduct (*Korea Supply*, 29 Cal. 4th at 1153),
5 which cannot consist of vague or speculative allegations. *See Westside Ctr. Assocs.*, 42 Cal. App.
6 4th at 524 (allegations that amount to mere "hope for an economic relationship and a desire for
7 future benefit" inadequate to satisfy pleading requirement) (internal quotation omitted).
8 Moreover, because the alleged economic benefit must be a *future* economic benefit, allegations of
9 interference with an existing contract are not sufficient for this claim. *See Sebastian Int'l, Inc. v.*
10 *Russolillo*, 186 F. Supp. 2d 1055, 1073-74 (C.D. Cal. 2000) (holding that plaintiff failed to allege
11 facts showing a prospective contract or economic advantage was disrupted because it referenced
12 only "existing contracts with its distributors and salons," and dismissing claim). Finally, vague
13 claims of potential additional sales to unspecified current or return customers are not sufficient.
14 *See Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, No. C 03-05340 JF, 2005 U.S. Dist.
15 LEXIS 6228, at *37 n.31, 39-40 (N.D. Cal. Mar. 30, 2005) (plaintiff's claim that, but for the
16 defendant's conduct, it was "reasonably certain that [the defendant] would realize additional sales
17 from existing customers and/or new customers" was insufficient to state a claim) (internal
18 quotation omitted).

19 Ellie Mae's sole factual allegation with respect to this element is insufficient: "Ellie Mae
20 has had valid and existing business relationships with the Ellie Mae Clients, with a reasonable
21 probability of realizing a financial profit therefrom." (Counterclaim ¶ 96). These facts merely
22 establish that Ellie Mae already has business relationships with current Ellie Mae clients, which
23 does not establish a claim for interference with prospective economic advantage because such a
24 claim cannot be based upon a current relationship. *Sebastian Int'l*, 186 F. Supp. 2d at 1073-74.
25 To the extent that Ellie Mae is alleging that it hopes to receive additional business from its current
26 customers, its claim is insufficiently vague. *See Google*, 2005 U.S. Dist. LEXIS 6228, at *37
27 n.31, 39-40.

1 Because Ellie Mae has failed to plead facts sufficient to support a claim of a “probability
2 of future economic benefit,” it has not stated a claim of interference with prospective economic
3 advantage and its eighth counterclaim should be dismissed.

4 **VI. ELLIE MAE FAILS TO STATE A CLAIM FOR INDUCEMENT OF**
5 **BREACH OF CONTRACT AND INTENTIONAL INTERFERENCE WITH**
6 **CONTRACTUAL RELATIONSHIP (*COUNTERCLAIMS 5 AND 7*)**

7 Ellie Mae’s claims for inducement of breach of contract and intentional interference with
8 contractual relationship are deficient for similar reasons. The following elements are required to
9 state a claim for intentional interference with contractual relationship or inducement of breach of
10 contract under California law: (1) a valid contract between plaintiff and a third party;
11 (2) defendant’s knowledge of this contract; (3) defendant’s intentional acts designed to induce a
12 breach or disruption of the contractual relationship; (4) actual breach or disruption of the
13 contractual relationship; and (5) resulting damage. *See Pac. Gas & Elec. Co. v. Bear Stearns &*
14 *Co.*, 50 Cal. 3d 1118, 1126 (1990) (elements of intentional interference with contractual
15 relationship); *see also PAI Corp.*, 2006 U.S. Dist. LEXIS 34828, at *9 (noting that “under
16 California law, [inducement to breach a contract] is called “interference with contractual
17 relations”).

18 Ellie Mae has not alleged facts to support any of these elements. As an initial matter, Ellie
19 Mae has not identified the breached or disrupted contractual relationship that is the basis for this
20 claim. Ellie Mae’s references to relationships with overbroad classes of third parties such as
21 “Encompass licensees” and “Ellie Mae Clients,” which is defined to include all Encompass users
22 (Counterclaim ¶¶ 29, 79, 91), do not provide enough notice for DocMagic to meaningfully
23 respond and defend itself, and thus fail to state a claim. *See Williams*, 2009 U.S. Dist. LEXIS
24 81958, at *48-49 & n.8 (directing plaintiff to file amended complaint with specificity sufficient to
25 enable defendants to frame defense).

26 Furthermore, Ellie Mae has not pled facts supporting the required element of actual breach
27 or disruption of a contractual relationship. As with the contributory copyright infringement claim
28 discussed above, this is fatal to Ellie Mae’s counterclaim because absent such breach or
disruption, DocMagic cannot be liable for a claim of intentional interference with contractual

1 relationship. *See Silicon Knights v. Crystal Dynamics*, 983 F. Supp. 1303, 1310
2 (N.D. Cal. 1997) (“[T]he complaint does not satisfy Rule 8(a) since there are no facts from which
3 the court or defendants can infer that [the relevant contractual relationship] was *actually disrupted*
4 *or impeded*, or that [plaintiff] suffered any damages as a result of [d]efendants’ actions.”)
5 (emphasis added); *SAP Am., Inc. v. Kensington & Taylor*, No. CV 96-1327 DT (BQRx), 1997
6 U.S. Dist. LEXIS 24125, at *25 (C.D. Cal. Feb. 11, 1997) (granting motion to dismiss where
7 customer list included names of existing customers, because “it is difficult to understand what
8 contract has been lost or disrupted by [defendant’s] alleged interference and more clarification is
9 needed in this regard”).

10 Ellie Mae has not included any allegations regarding the remaining elements of the
11 claims: that DocMagic knew about the unidentified contract, that DocMagic had the intent to
12 disrupt the unidentified contractual relationship, and that Ellie Mae has been damaged as a result
13 of the alleged breach. Absent such allegations, Ellie Mae’s counterclaims for inducement of
14 breach of contract and intentional interference with contractual relationship fail to state a claim.
15 The Court should dismiss these counterclaims under Rule 12(b)(6).

16 **VII. ELLIE MAE FAILS TO STATE A CLAIM FOR UNFAIR COMPETITION**
17 **(COUNTERCLAIM 9)**

18 Ellie Mae fails to state a claim under California Business and Professions Code Section
19 17200 for three independent reasons. First, the claim fails for indefiniteness under *Iqbal* and
20 *Twombly*. Second, Ellie Mae fails to allege that DocMagic’s conduct threatens an incipient
21 violation of the antitrust laws, as Ellie Mae is required to do to state a claim for “unfair” conduct
22 against a competitor. Third, Ellie Mae fails to allege that it lost money or property as a result of
23 the alleged unfair competition.

24 **A. Ellie Mae Fails to Allege Sufficient Facts to Support Its Claim**

25 Ellie Mae’s Section 17200 claim consists of nothing more than a clipped recitation of the
26 claim’s elements. (See Counterclaim ¶¶ 102-04.) For example, Ellie Mae does not even attempt
27 to identify the conduct that it alleges supports its assertion that DocMagic has engaged in “unfair”
28 conduct within the meaning of Section 17200. Ellie Mae says only that “DocMagic’s acts of

1 unfair competition *as alleged herein* threaten to and will cause irreparable injury to Ellie Mae’s
2 business” (*Id.* ¶ 104 (emphasis added)), but, rather than identify the conduct “alleged herein,”
3 Ellie Mae incorporates by reference “*all* previous paragraphs” in the Counterclaim. (*Id.* ¶ 102;
4 *see also id.* ¶ 104 (referring to “*such acts* by DocMagic” without specifying the alleged “acts”)
5 (emphasis added).)

6 Ellie Mae’s Section 17200 counterclaim thus fails for indefiniteness. As the Supreme
7 Court has made clear, a claim that includes nothing more than a “formulaic recitation of the
8 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (internal quotations
9 omitted); *see also Iqbal*, 129 S. Ct. at 1953. Courts regularly dismiss Section 17200 claims for
10 this very defect. *See, e.g., Bonner v. Redwood Mortgage Corp.*, No. C 10-00479 WHA,
11 2010 U.S. Dist. LEXIS 29969, at *22-23 (N.D. Cal. Mar. 29, 2010) (holding complaint was
12 “plainly insufficient under *Iqbal* and *Twombly*” where it alleged only that “[b]y committing the
13 acts described herein, defendants . . . have engaged in unfair business practice, causing injury and
14 damages to Plaintiff and therefore violated [Section 17200]” without any supporting factual
15 allegations (internal quotation omitted)); *Qureshi v. Countrywide Home Loans, Inc.*,
16 No. C 09-4198 SBA, 2010 U.S. Dist. LEXIS 21843, at *20-21 (N.D. Cal. Mar. 10, 2010)
17 (holding 17200 claim alleging defendants “committed unlawful, unfair and/or fraudulent business
18 practices” without particular facts in support thereof was “precisely the type of ‘unadorned, the-
19 defendant-unlawfully-harmed-me accusation’ that the Supreme Court has held is impermissible”)
20 (quoting *Iqbal*, 129 S. Ct. at 1949); *Nevis v. Wells Fargo Bank*, No. C 07-2568 MHP, 2007 U.S.
21 Dist. LEXIS 65932, at *14-15 (N.D. Cal. Sept. 6, 2007) (dismissing 17200 claim for failure to
22 allege “particular conduct, practices, or activities” that gave rise to claim).

23 **B. Ellie Mae Fails to Allege Conduct That Threatens an Incipient**
24 **Violation of Antitrust Law**

25 Ellie Mae alleges that DocMagic is engaged in “unfair competition in violation of”
26 Section 17200 (Counterclaim ¶ 103), but it is unclear from the Counterclaim precisely what
27 “unfair” acts Ellie Mae alleges give rise to this claim. One thing is clear, however: Ellie Mae
28 fails to allege conduct that threatens an incipient violation of the antitrust laws, as required by the

1 California Supreme Court. In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone*
2 *Co.*, 20 Cal. 4th 163 (1999), the court held that under California law, if a plaintiff claims to have
3 suffered injury from a direct competitor’s “unfair” act or practice and invokes Section 17200, the
4 word “unfair” means “conduct that threatens an incipient violation of antitrust law, or violates the
5 policy or spirit of one of those laws because its effects are comparable to or the same as a
6 violation of the law, or otherwise significantly threatens or harms competition.” *Id.* at 187. The
7 California Supreme Court adopted this definition because it determined that a finding of
8 unfairness to competitors should be “tethered to some legislatively declared policy or proof of
9 some actual or threatened impact on competition.” *Id.* at 186-87.

10 Ellie Mae does not allege any threat of injury to competition, nor does it attempt to state
11 any claims for violations of antitrust laws. Accordingly, its claim fails as a matter of law. *See*,
12 *e.g.*, *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1152-54 (9th Cir. 2008) (citing *Cel-*
13 *Tech* and affirming district court’s dismissal of complaint); *Stevenson Real Estate Servs., Inc. v.*
14 *CB Richard Ellis Real Estate Servs., Inc.*, 138 Cal. App. 4th 1215, 1225 (2d Dist. 2006)
15 (affirming judgment on pleadings because complaint “alleges no conduct even remotely
16 approaching a violation of an antitrust law or the policy or spirit of antitrust laws”).

17 **C. Ellie Mae Fails to Allege That It Lost Money or Property as a Result of**
18 **DocMagic’s Alleged Unfair Competition**

19 California’s Proposition 64 amended the state’s unfair competition law to limit standing
20 under Section 17200 to those who have suffered “injury in fact and ha[ve] lost money or property
21 as a result of unfair competition.” *Californians for Disability Rights v. Mervyn’s, LLC*, 39 Cal.
22 4th 223, 228 (2006). “Because remedies for individuals under the [unfair competition law] are
23 restricted to injunctive relief and restitution, the import of the requirement is to limit standing to
24 individuals who suffer losses of *money or property* that are eligible for restitution.” *Walker v.*
25 *Geico Gen. Ins. Co.*, 558 F.3d 1025, 1027 (9th Cir.) (emphasis added) (quoting *Buckland v.*
26 *Threshold Enters., Ltd.*, 155 Cal. App. 4th 798, 817 (2007)), *cert. denied*, 130 S. Ct. 400 (2009);
27 *accord Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305, 1348 (2009); *Citizens of*
28 *Humanity, LLC v. Costco Wholesale Corp.*, 171 Cal. App. 4th 1, 22 (2009). A plaintiff who

1 cannot establish the requisite “lost money or property” for purposes of monetary relief may not
2 sue for injunctive relief. *Walker*, 558 F.3d at 1027.

3 Ellie Mae does not allege that it lost money or property as a result of DocMagic’s alleged
4 acts of unfair competition. Ellie Mae’s sole allegation regarding harm vaguely alleges “injury to
5 Ellie Mae’s business” and that DocMagic’s acts “have misled or confused and/or will mislead or
6 confuse consumers about the products or services that they received from DocMagic.”

7 (Counterclaim ¶ 104.) Neither of these allegations establishes that Ellie Mae lost money or
8 property.⁷ Accordingly, the Section 17200 claim should be dismissed for lack of standing. *See*
9 *Walker*, 558 F.3d at 1027 (affirming dismissal of Section 17200 claim due to lack of standing for
10 failure to establish requisite lost money or property); *Katz v. Cal-Western Reconveyance Corp.*,
11 No. d:09-04866-JF, 2010 U.S. Dist. LEXIS 13385, at *13-14 (N.D. Cal. Jan. 27, 2010) (granting
12 motion to dismiss Section 17200 claim where plaintiff did not allege loss of money or property).

13 CONCLUSION

14 For the foregoing reasons, the Court should dismiss Ellie Mae’s first, second, third, fourth,
15 fifth, seventh, eighth, and ninth counterclaims.

16 Dated: June 14, 2010

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24
25 ⁷ In other passages in the Counterclaim, Ellie Mae appears to allege harm resulting from
26 delayed software updates, bug fixes, Ellie Mae’s inability to notify its clients of downtime, and
27 Ellie Mae’s inability to provide its “usual level of superior customer service.” (Counterclaim
28 ¶¶ 31-32, 41.) Not only do none of these allegations of harm establish that Ellie Mae lost money
or property, Ellie Mae does not attempt to tie any of these allegations of harm to DocMagic’s
alleged acts of “unfair” competition.